

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,
v.
BRIAN FOX,

Defendant.

Case No. 3:15-cr-00061-HDM-WGC
Case No. 3:19-cv-00371-HDM

ORDER

Before the court is defendant Brian Fox's ("Fox") motion to vacate, correct, or set aside sentence pursuant to 28 U.S.C. § 2255 (ECF No. 856). The government has opposed (ECF No. 868), and Fox has replied (ECF Nos. 885 & 887).

I. Background

On July 28, 2015, Fox was arrested by state authorities when he was found in possession of marijuana and 314 grams of pure methamphetamine, as confirmed by a DEA laboratory. He posted bail on August 3, 2015, and two days later was charged in a federal indictment with several controlled-substances-related offenses. (ECF No. 1). Although an arrest warrant was issued, it was nearly two years before Fox was apprehended. (ECF No. 545).

1 On November 29, 2017, pursuant to an agreement, Fox entered
2 a plea to guilty to Count Eight of the second superseding
3 indictment.¹ Count Eight charged possession with intent to
4 distribute at least 50 grams of actual methamphetamine in violation
5 of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). (ECF Nos. 221,
6 601 & 606). Pursuant to the agreement, the remaining charges
7 against Fox would be dismissed and the parties were free to argue
8 for or against application of the obstruction of justice
9 enhancement under U.S.S.G. § 3C1.1. (ECF No. 601 at 6). The
10 agreement also provided that the government would recommend a low-
11 end sentence so long as Fox did not seek a sentence below his
12 Guidelines range as calculated by the court. The agreement
13 specifically provided that if Fox chose to argue for a below-
14 Guidelines sentence, including for the statutory minimum of ten
15 years, the government would not be bound by that promise. (ECF No.
16 601 at 5, 10).

17 At the time Fox changed his plea, he acknowledged that he was
18 pleading guilty to possession with intent to distribute at least
19 50 grams of actual methamphetamine, that the government would have
20 to prove he had possessed at least 50 grams of actual
21 methamphetamine, and that he in fact possessed at least 50 grams
22 of methamphetamine. (ECF No. 720 (Tr. 4-5, 7-8, 25)). He further
23 agreed that the facts contained in his plea agreement on pages 3
24 to 4 were true to the best of his knowledge. (*Id.* at 8). The court
25 explained to Fox that in entering his plea, he was waiving several
26

27 ¹ Before his arrest, the indictment was superseded two times. Fox was charged
28 in in Counts One, Two, Eight and Nine of the second superseding indictment.
(ECF No. 221).

1 important Constitutional rights, including any defenses he might
2 have had to the offense (*Id.* at 5-6).

3 Fox indicated that he understood that while he was free to
4 argue for a below-Guidelines sentence, the government would not be
5 bound to recommend a low-end sentence if he did so. (*Id.* at 15-
6 16). He understood that the obstruction of justice enhancement
7 might apply, that his adjusted offense level could be 29 or 31,
8 and that his Guidelines range could be as high as 188 to 235 months
9 if he were to receive the enhancement and have a criminal history
10 category of VI. (*Id.* at 8-9, 12). The court advised Fox that his
11 criminal history category was likely to be high due to his record.
12 (*Id.* at 13).

13 Fox also acknowledged -- and the court twice explained -- the
14 appellate waiver, and the fact that under it Fox would not be
15 allowed to appeal any sentence that fell within or below the
16 Guidelines range. (*Id.* at 19-21, 23-24).

17 The court repeatedly asked Fox if he read and understood the
18 plea agreement or if he had any questions about the agreement, and
19 each time Fox indicated he had no questions and understood
20 everything. (*Id.* at 3, 4, 12-13, 19). Fox indicated -- five
21 separate times -- that no one, including his counsel, had promised
22 him anything other than what was in the agreement itself. (*Id.* at
23 3, 19, 21, 22). And Fox acknowledged that he was entering his plea
24 freely and voluntarily, (*id.* at 21-22), and that no one had
25 threatened or forced him to plead guilty, (*id.* at 3, 22). The court
26 accepted the guilty plea as having been entered freely and
27 voluntarily.

1 Prior to sentencing, defense counsel filed a memorandum in
2 which he argued for a sentence of ten years. (ECF No. 665). While
3 counsel also asserted that "Fox was not actively, deceitfully, and
4 strategically hiding from the law as the PSR seems to indicate and
5 as the United States will possibly argue at sentencing," he did
6 not explicitly raise any objection to the obstruction of justice
7 enhancement. (*Id.* at 3). Nor, at sentencing, did counsel make such
8 an argument. (ECF No. 721 (Tr. 2)). Instead, counsel repeated his
9 arguments in favor of a ten-year sentence. (*See id.* at 3). During
10 allocution, Fox himself stated: "I'm asking that you sentence me
11 to the 10 years." (*Id.* at 4).

12 The government, on the other hand, argued for application of
13 the obstruction enhancement, and, because Fox was seeking a
14 sentence below any applicable Guidelines range, a high-end
15 sentence. (*Id.* at 5-7).

16 The court agreed that the enhancement was appropriate because

17
18 the evidence is quite clear that [Fox] was well aware of
19 the charges. He had been arrested, been picked up by the
20 State authorities, and then he was indicted. He was well
21 aware of the charges. He then absconded, left the
22 jurisdiction. And it took almost two years, not quite
23 two years, but almost two years before he was
24 apprehended. There was a substantial effort on the part
25 of the Marshal's Office to locate Mr. Fox, to bring him
26 back. Other defendants had been before the Court for
some time who were jointly involved in the conspiracy
and conduct that was the subject of substantial
litigation before this court, and Mr. Fox did not
voluntarily surrender himself at any point during that
time. It required the officials to locate him and then
bring him back into custody to face the charges here.
So, there is absolutely, crystal clear evidence that the
adjustment for obstruction of justice is appropriate in
this case.

27 (*Id.* at 9-10). Calculating Fox's total offense level as 31, with
28 a criminal history category of five, the court found a Guidelines

1 range of 168 months to 210 months applied. (*Id.* at 10-11). The
2 court concluded that a sentence in the mid-range was appropriate,
3 and therefore sentenced Fox to 174 months' imprisonment. (*Id.* at
4 13).

5 Five days after entry of judgment, Fox filed a *pro se* notice
6 of appeal. (ECF No. 670). Following appointment of new counsel for
7 purposes of the appeal, the appeal was dismissed on counsel's
8 representation that no grounds for relief existed due to the valid
9 appellate waiver. (ECF No. 807). The instant § 2255 motion
10 followed.

11 **II. Standard**

12 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
13 vacate, set aside, or correct his sentence if: (1) the sentence
14 was imposed in violation of the Constitution or laws of the United
15 States; (2) the court was without jurisdiction to impose the
16 sentence; (3) the sentence was in excess of the maximum authorized
17 by law; or (4) the sentence is otherwise subject to collateral
18 attack. *Id.* § 2255(a).

19 Fox raises primarily claims of ineffective assistance of
20 counsel. Ineffective assistance of counsel claims are governed by
21 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,
22 a petitioner must satisfy two prongs to obtain habeas relief—
23 deficient performance by counsel and prejudice. 466 U.S. at 687.
24 With respect to the performance prong, a petitioner must carry the
25 burden of demonstrating that his counsel's performance was so
26 deficient that it fell below an "objective standard of
27 reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's
28 performance must be highly deferential,' and 'a court must indulge

1 a strong presumption that counsel's conduct falls within the wide
2 range of reasonable professional assistance.'" *Knowles v.*
3 *Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In
4 assessing prejudice, the court "must ask if the defendant has met
5 the burden of showing that the decision reached would reasonably
6 likely have been different absent [counsel's] errors." *Strickland*,
7 466 U.S. at 696.

8 **III. Analysis**

9 Fox advances, in effect, nine grounds for relief:² (1) trial
10 counsel was ineffective for failing to file a notice of appeal;
11 (2) trial counsel was ineffective for failing to communicate with
12 Fox after sentencing; (3) trial counsel was ineffective for failing
13 to challenge the obstruction of justice enhancement; (4) trial
14 counsel was ineffective for failing to argue that his criminal
15 history category was improperly calculated based on an allegedly
16 nonexistent dishonorable discharge; (5) trial counsel was
17 ineffective for failing to argue that the government had breached
18 the plea agreement by arguing for a high-end Guidelines sentence;
19 (6) trial counsel ineffectively advised Fox to ask for a 10-year
20 sentence; (7) the court violated Federal Rule of Criminal Procedure
21 when it failed to ask Fox if he had gone over his presentence
22 report ("PSR") with his attorney; (8) his plea, including his
23 appellate waiver, was not knowing and voluntary; and (9) trial

24
25 ² The court numbers the claims in the order they appear in Fox's memorandum and
26 supplement and not as listed on the § 2255 form. That is, Ground Five of the
27 form is listed as a claim that appellate counsel was ineffective. (See ECF No.
28 856 at 9). However, the fifth ground for relief in the memorandum asserts trial
counsel was ineffective for breaching the plea agreement. Appellate counsel's
concession that the appellate waiver was valid and precluded consideration of
Fox's claims on appeal is more appropriately addressed in the context of Ground
Eight.

1 counsel was ineffective for failing to require the government to
2 produce a lab report of the drugs he was charged with possessing.
3 (See ECF No. 856).¹

4 A. Ground One

5 In his first ground for relief, Fox asserts that trial counsel
6 was ineffective for failing to file a notice of appeal. He argues
7 that counsel abandoned him after sentencing and ignored multiple
8 requests to communicate, so he had to file his own *pro se* notice
9 of appeal.

10 Despite Fox's argument that prejudice is presumed where
11 counsel failed to file a notice of appeal, that presumption cannot
12 apply where, as here, the defendant obtained a timely appeal.
13 There is no reasonable probability of a different outcome if
14 counsel had not been deficient - that is, if he had filed a notice
15 of appeal. That is because Fox had already obtained a timely
16 appeal, albeit on his own initiative. Because Fox cannot
17 demonstrate prejudice, he is not entitled to relief on the first
18 ground of his motion.

19 B. Ground Two

20 In his second ground for relief, Fox asserts that trial
21 counsel failed to communicate with him throughout the proceedings
22 and after sentencing, and merely pushed Fox to enter a guilty plea.
23 He asserts that communication would have enabled him to have a
24 broader understanding of the proceedings and more opportunity to
25 effectively communicate.

26 Fox does not identify any specific prejudice he suffered from
27 counsel's alleged deficient performance. He alleges only that he
28 would have better understood the proceedings. This is insufficient

1 to allege - or prove - that the outcome of the proceedings was
2 reasonably likely to have been different had counsel better
3 communicated. Fox is not therefore entitled to relief on the second
4 ground of his motion.

5 C. Ground Three

6 In his third ground for relief, Fox asserts ineffective
7 assistance of counsel and violation of his due process and equal
8 protection rights based on counsel's failure to argue against, and
9 the court's application of, the two-level obstruction of justice
10 enhancement. Fox argues that if counsel had argued this point,
11 there is a reasonable probability his adjusted offense level would
12 have been 29 instead of 31 and, consequently, that his sentencing
13 range would have been lower.

14 Under United States Sentencing Guidelines § 3C1.1, a two-
15 level enhancement applies if "the defendant willfully obstructed
16 or impeded, or attempted to obstruct or impede, the administration
17 of justice with respect to the investigation, prosecution, or
18 sentencing of the instant offense of conviction, and ... the
19 obstructive conduct related to ... the defendant's offense of
20 conviction and any relevant conduct; or ... a closely related
21 offense." "[A]voiding or fleeing from arrest" is generally not
22 obstructive conduct under § 3C1.1. *Id.* § 3C1.1 app. n.5(D).
23 Escaping from custody or willfully failing to appear for a judicial
24 proceeding is obstructive conduct. *Id.* § 3C1.1 app. n.4(E).

25 The Ninth Circuit has held that the enhancement was not
26 properly applied where the defendants fled before arrest, although
27 they remained on the lam for nine months and knew they were wanted
28 during this time. *United States v. Madera-Gallegos*, 945 F.2d 264,

1 268 (9th Cir. 1991). The enhancement was similarly improper where
2 the defendant had fled the state while he was being investigated,
3 but before he was indicted, and remained out of state -
4 intentionally using aliases to avoid detection - while his
5 codefendants were arraigned, pleaded guilty or went to trial.
6 *United States v. Stites*, 56 F.3d 1020, 1026 (9th Cir. 1995), as
7 amended (Aug. 2, 1995). In contrast, the enhancement was properly
8 applied where the defendant had already been arrested for the
9 offense, was told he was a suspect in a criminal case and "knew
10 that he was expected to turn himself in, and then, after fleeing,
11 'played a cat-and-mouse game of avoiding the authorities.'" *United*
12 *States v. Madera-Gallegos*, 945 F.2d 264, 268 (9th Cir. 1991)
13 (discussing *United States v. Mondello*, 927 F.2d 1463, 1467 (9th
14 Cir. 1991)).

15 For the purpose of § 3C1.1, "'custody' need only involve some
16 degree of official control over a defendant such that a subsequent
17 evasion amounts to more than mere 'avoiding or fleeing from
18 arrest.' Stated differently, the defendant must have been
19 submitted, willfully or otherwise, to the due process of law before
20 the obstruction adjustment can obtain." *United States v. Draper*,
21 996 F.2d 982, 985-86 (9th Cir. 1993). Thus, the enhancement is
22 properly applied where the defendant absconded after being
23 released on bond. See *United States v. Giang*, 2 F. App'x 837, 838
24 (9th Cir. 2001) ("The record shows, however, that Giang left the
25 country after (1) signing a document indicating that he was being
26 released pursuant to a bond; (2) surrendering a passport in
27 anticipation of being released on bond; and (3) attending
28 proceedings wherein the constraints of bond release had been

1 discussed. In light of these facts, the district court did not
2 clearly err by imposing the obstruction of justice enhancement.").

3 Fox posted bail after his arrest by state authorities for the
4 conduct underlying this prosecution, and then he left the
5 jurisdiction. Over the course of the next two years, he moved back
6 and forth among three states, using different phone numbers and,
7 possibly, a fake I.D.

8 Fox argues that because he was not under federal indictment
9 when he fled and there is no evidence he knew of the federal
10 charges, his actions were nothing more than avoiding arrest, as in
11 *Madera-Gallegos* and *Stites*. The government argues that *Mondello* is
12 controlling because Fox fled after posting bail and engaged in
13 actions to avoid detection by authorities for nearly two years.

14 As in *Mondello*, Fox had been arrested before he fled, and he
15 made a concerted effort thereafter to avoid detection. The fact
16 Fox was arrested by state authorities and had not been federally
17 indicted when he fled is not dispositive. See *United States v.*
18 *Lato*, 934 F.2d 1080, 1082-83 (9th Cir. 1991) ("The following
19 commentary to section 3C1.1 supports the view that there is no
20 state-federal distinction for obstruction of justice: 'This
21 section provides a sentence enhancement for a defendant who engages
22 in conduct calculated to mislead or deceive authorities....' . .
23 . . There is no hint that the term 'authorities' was used with
24 reference to federal rather than state officials."); see also
25 *United States v. Roberts*, 243 F.3d 235, 238-40 (6th Cir. 2001).
26 Although Fox's apprehension for his wrongdoing was initially
27 conducted by state authorities, he was eventually prosecuted for
28 that conduct on federal charges instead. A sufficient nexus

1 therefore exists between Fox's obstructive conduct and the instant
2 offense. Application of the obstruction enhancement under these
3 circumstances was accordingly proper.

4 Because the obstruction enhancement was properly applied, Fox
5 can show neither deficient performance nor prejudice. As such,
6 Fox is not entitled to relief on his third ground for relief.

7 D. Ground Four

8 In his fourth ground for relief, Fox argues that his trial
9 and appellate attorneys were ineffective for failing to argue that
10 his criminal history category was improperly calculated based on
11 a nonexistent dishonorable discharge. Fox asserts there was no
12 dishonorable discharge reflected in his PSR. Fox refers to his
13 conviction in paragraph 80 of the PSR, from May 2010, arguing that
14 it shows he was honorably discharged from probation for that
15 offense. (See ECF No. 856 at 27 (referencing judgment of May 25,
16 2010)).

17 Fox's argument is based first on an incorrect reading of his
18 PSR. The May 2010 conviction that he references (ECF No. 856 at
19 27) does in fact reflect that he was dishonorably discharged from
20 probation. Fox cannot therefore show deficient performance. While
21 it is true that Fox was *honorably* discharged from another of his
22 convictions -- that reflected in paragraph 77 -- for which he
23 received three criminal history points, whether the discharge was
24 dishonorable or not plays no role in the number of points
25 attributable to the conviction. (See U.S.S.G. §§ 4A1.1(a)(1) and
26 4A1.2(b)(1)). Thus, Fox cannot show either deficient performance
27 or prejudice from his attorneys' failure to object on these grounds
28 and is not entitled to relief on the fourth ground of his motion.

1 E. Ground Five

2 In his fifth ground for relief, Fox argues that the government
3 breached the plea agreement by recommending a sentence above the
4 low end of the Guidelines range, and that counsel was ineffective
5 for failing to argue as much. The government argues that there was
6 no breach of the plea agreement because the agreement explicitly
7 allowed the government to argue for a higher sentence if Fox sought
8 a below Guidelines sentence.

9 Ground Five is without merit. As discussed above, the plea
10 agreement specifically provided that if Fox chose to argue for a
11 below-Guidelines sentence, the government was released from its
12 obligation to recommend a low-end sentence. It was neither a breach
13 by the defense to argue for a lower sentence nor a breach by the
14 government to argue for a higher sentence once he did. Fox's
15 attorneys did not therefore perform deficiently for failing to
16 argue that the government had breached the plea agreement nor, for
17 the same reason, was Fox prejudiced by this failure.

18 Fox is not entitled to relief on his fifth ground for relief.

19 F. Ground Six

20 In his sixth ground for relief, Fox argues that trial counsel
21 was ineffective for advising him to seek a 10-year sentence despite
22 knowing that this would be a breach of the plea agreement and would
23 allow the government to argue for a higher than low-end sentence.

24 As just noted, it was not a breach of the plea agreement for
25 counsel to seek a below-Guidelines sentence. It was a choice,
26 however, that did open the defense up to the possibility that the
27 government would seek a high-end sentence, which is what ultimately
28 happened. In order to obtain relief, Fox must therefore show that

1 counsel's strategic decision in this regard constituted deficient
2 performance.

3 "[S]trategic choices made after thorough investigation of law
4 and facts relevant to plausible options are virtually
5 unchallengeable." *Strickland*, 466 U.S. at 690. There is no
6 indication here that counsel made a less than reasonable
7 investigation. And it is clear that counsel specifically
8 negotiated for the right to argue for the minimum sentence, as the
9 plea agreement explicitly carves out such a possibility. It was
10 not an unreasonable strategic decision for counsel to advise Fox
11 to seek a ten-year sentence from this court and to argue for the
12 same, despite the fact that it allowed the government to argue for
13 a higher sentence. Fox has not therefore established ineffective
14 assistance of counsel based on counsel's decision to seek a ten-
15 year sentence.

16 Moreover, to the extent Fox argues that he was misled by
17 counsel into believing that seeking a ten-year sentence would not
18 result in a breach of the plea agreement, the contention is not
19 well taken. At Fox's change of plea, the court thoroughly
20 explained the sentencing possibilities to Fox, including that his
21 range could be as high as 188 to 235 months and that if he chose
22 to argue for a ten-year sentence, the government would not be bound
23 to recommend a low-end sentence. Fox indicated repeatedly that he
24 understood. Under these circumstances, the court does not find
25 credible Fox's contention that he did not understand the
26 ramifications of seeking a ten-year sentence at sentencing. He
27 has not, therefore, shown either prejudice or deficient
28 performance.

1 Fox is not entitled to relief on his sixth ground for relief.

2 G. Ground Seven

3 In his seventh ground for relief, Fox argues that the court
4 failed to ensure that Fox had gone over his PSR with his attorney,
5 resulting in a violation of Federal Rule of Civil Procedure
6 32(i)(1)(A). Fox argues he did not go over the PSR with his
7 attorney. If he had, he argues, he would have discovered that he
8 incorrectly received three additional criminal history points for
9 a dishonorable discharge that did not exist.

10 To the extent Fox asserts trial and appellate counsel were
11 ineffective for failing to raise this point, the argument is
12 without merit. Fox cannot demonstrate prejudice, for the reasons
13 set forth with respect to Ground Four. Furthermore, appellate
14 counsel was not deficient in failing to raise the issue because
15 Fox had waived any sentencing errors as part of his plea agreement.
16 See (ECF No. 601 at 14); *United States v. Savage*, 406 Fed. App'x
17 220, 221 (9th Cir. 2010) (unpublished opinion) (defendant's waiver
18 of his right to appeal "'the manner in which [his] sentence [was]
19 determined' . . . plainly encompasses the district court's alleged
20 errors under Rule 32(i)(1)(A). . . .").

21 To the extent Fox argues that he is entitled to relief based
22 on the court's error, he would not be entitled to relief -- even
23 assuming he had not waived this claim as part of his plea
24 agreement. See *Hill v. United States*, 368 U.S. 424, 426 (1962)
25 (holding that, without more, a technical violation of Rule 32 "is
26 not of itself an error that can be raised by collateral attack.");
27 *Cavines v. United States*, 2008 WL 4372712, at *6 (N.D. Ill. Mar.
28 25, 2008); *United States v. Reyes*, 2006 WL 3289945, at *2 (W.D.

1 Mich. Nov. 13, 2006); *Taylor v. United States*, 2006 WL 1745104, at
2 *1 (E.D. Tenn. June 21, 2006). Collateral relief for a technical
3 violation of Rule 32 is available only where the defendant has
4 been prejudiced by the court's error. *Peguero v. United States*,
5 526 U.S. 23, 27-28 (1999). Because, as discussed above, Fox has
6 not demonstrated that his criminal history category was
7 incorrectly calculated, he has not demonstrated that he suffered
8 prejudice. As such, Fox is not entitled to relief on his seventh
9 ground for relief.

10 H. Ground Eight

11 In Fox's eighth ground for relief,³ Fox argues that his
12 appellate waiver was not knowing and voluntary. Fox argues that
13 neither the court nor his attorney fully explained the appellate
14 waiver. His allegations also appear to suggest a claim that his
15 plea was not knowing and voluntary, because he asserts he was
16 misled by his counsel into believing he would receive a ten-year
17 sentence and bullied by the government into entering a plea.

18 The government argues that Fox's allegations are completely
19 belied by his responses to the court's canvass at the time he
20 changed his guilty plea. The government argues that Fox's assertion
21 that he was confused by the proceedings is particularly
22 unbelievable in light of his many contacts with, and convictions
23 through, the criminal justice system.

24 As discussed previously, the court engaged in a significant
25 canvass of Fox, in which it repeatedly asked Fox if he understood
26 the proceedings or if he had any questions, and in which Fox

27 ³ The eighth ground for relief appears in Fox's supplement, which he identifies
28 as an addendum to Ground Five. (ECF No. 856 at 34-40). As previously noted, the
court construes this claim as Ground Eight.

1 repeatedly advised that he had not been promised anything to enter
2 his plea or threatened to do so.

3 "Solemn declarations in open court carry a strong presumption
4 of verity. The subsequent presentation of conclusory allegations
5 unsupported by specifics is subject to summary dismissal, as are
6 contentions that in the face of the record are wholly incredible."
7 *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); see also *United*
8 *States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008) ("Statements
9 made by a defendant during a guilty plea hearing carry a strong
10 presumption of veracity in subsequent proceedings attacking the
11 plea.").

12 Fox repeatedly indicated that he understood the plea
13 agreement in all of its relevant particulars and indicated that no
14 one had promised him anything to sign the agreement. His assertions
15 now that his plea, including the appellate waiver, was not knowing
16 or voluntary are not well taken. The court is likewise not
17 persuaded that Fox did not understand that arguing for a sentence
18 below ten years would open him up to an argument by the government
19 for a high-end sentence, as that possibility was explicitly
20 discussed with him during the canvass, and Fox stated that he
21 understood. Fox therefore cannot establish either that his plea
22 and appellate waiver was unknowing or involuntary, that he was
23 bullied into entering the plea, or that he was misled by counsel
24 to do so.

25 Appellate counsel was not, moreover, ineffective in conceding
26 the validity of the appellate waiver. Not only did the plea
27 agreement set forth the waiver, the court went over the waiver
28 with Fox in detail, specifically advising him that the only thing

1 he would be allowed to appeal would be an above-Guidelines
2 sentence. Appellate counsel was not deficient in conceding the
3 appellate waiver's validity as to any and all claims, nor did
4 counsel's conduct cause Fox prejudice.

5 Fox is not entitled to relief on his eighth ground for relief.

6 I. Ground Nine

7 In his ninth ground for relief, Fox asserts that trial counsel
8 was ineffective for failing to require the government to produce
9 a lab report of the drugs seized from his vehicle. He argues that
10 the drugs were of poor quality and thus he may not have possessed
11 at least fifty grams of actual methamphetamine.

12 The government argues that because Fox admitted to possessing
13 314 grams of pure methamphetamine, he cannot demonstrate deficient
14 performance or prejudice.

15 Fox has not established that had counsel obtained a lab report
16 he would not have entered a plea of guilty to Count Eight of the
17 second superseding indictment. Moreover, he has not established
18 that counsel was deficient for failing to seek a report. The DEA's
19 lab report reflected that Fox was found in possession of 314 grams
20 of pure methamphetamine. Fox has not established that reasonable
21 counsel would have pursued further testing to determine if the
22 amount of actual methamphetamine in this sample fell below 50
23 grams, particularly where the government was offering a plea
24 agreement that dismissed the other three charges pending against
25 Fox. Fox therefore cannot demonstrate deficient performance,
26 either.

27 Fox is not entitled to relief on his ninth ground for relief.

28 J. Other Assertions

1 The motion contains several additional assertions not
2 obviously tied to any ground for relief. For example, Fox argues
3 that the court injected itself into the plea negotiations by
4 expressing its opinion on the applicable sentencing range during
5 the sentencing hearing. This claim is without merit. The court's
6 opinion as to the applicable sentencing range after the defendant
7 had already entered a change of plea does not constitute
8 involvement in plea negotiations.

9 Fox also argues his offense level was improperly calculated
10 to be level 31 when it should have been 29 in accordance with the
11 plea agreement. (ECF No. 856 at 17). As noted above, the plea
12 agreement - and the court during its canvass of Fox - specifically
13 note that the offense level could be 29 or 31 depending on whether
14 the obstruction enhancement were to apply. Because an offense level
15 of 31 was contemplated by the plea agreement, this argument is
16 without merit. It is, moreover, waived by Fox's valid appellate
17 waiver.

18 The court has additionally considered all of Fox's
19 contentions not herein addressed and finds them to be without
20 merit.

21 **IV. Evidentiary Hearing**

22 Fox requests an evidentiary hearing. The court is not required
23 to conduct a hearing on a § 2255 motion if "the motion and the
24 files and records of the case conclusively show that the prisoner
25 is entitled to no relief." 28 U.S.C. § 2255(b). Because the motion
26 and files and records of this case conclusively show that Fox is
27 not entitled to relief, his request for an evidentiary hearing
28 will be denied.

1 **V. Certificate of Appealability**

2 In order to proceed with an appeal, Fox must receive a
3 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
4 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
5 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550,
6 551-52 (9th Cir. 2001). Generally, a defendant must make "a
7 substantial showing of the denial of a constitutional right" to
8 warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28
9 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
10 (2000). "The petitioner must demonstrate that reasonable jurists
11 would find the district court's assessment of the constitutional
12 claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*,
13 529 U.S. at 484). In order to meet this threshold inquiry, Fox has
14 the burden of demonstrating that the issues are debatable among
15 jurists of reason; that a court could resolve the issues
16 differently; or that the questions are adequate to deserve
17 encouragement to proceed further. *Id.*

18 The court has considered the issues raised by Fox, with
19 respect to whether they satisfy the standard for issuance of a
20 certificate of appealability, and determines that none meet that
21 standard. Accordingly, Fox will be denied a certificate of
22 appealability.

23 **VI. Conclusion**

24 In accordance with the foregoing, IT IS THEREFORE ORDERED
25 that Fox's motion to vacate, set aside or correct sentence pursuant
26 to 28 U.S.C. § 2255 (ECF No. 856) is DENIED.

27 IT IS FURTHER ORDERED that Fox's request for an evidentiary
28 hearing is DENIED.

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IT IS FURTHER ORDERED that Fox is DENIED a certificate of appealability.

The Clerk of Court shall enter final judgment accordingly.

DATED: This 12th day of February, 2020.


UNITED STATES DISTRICT JUDGE